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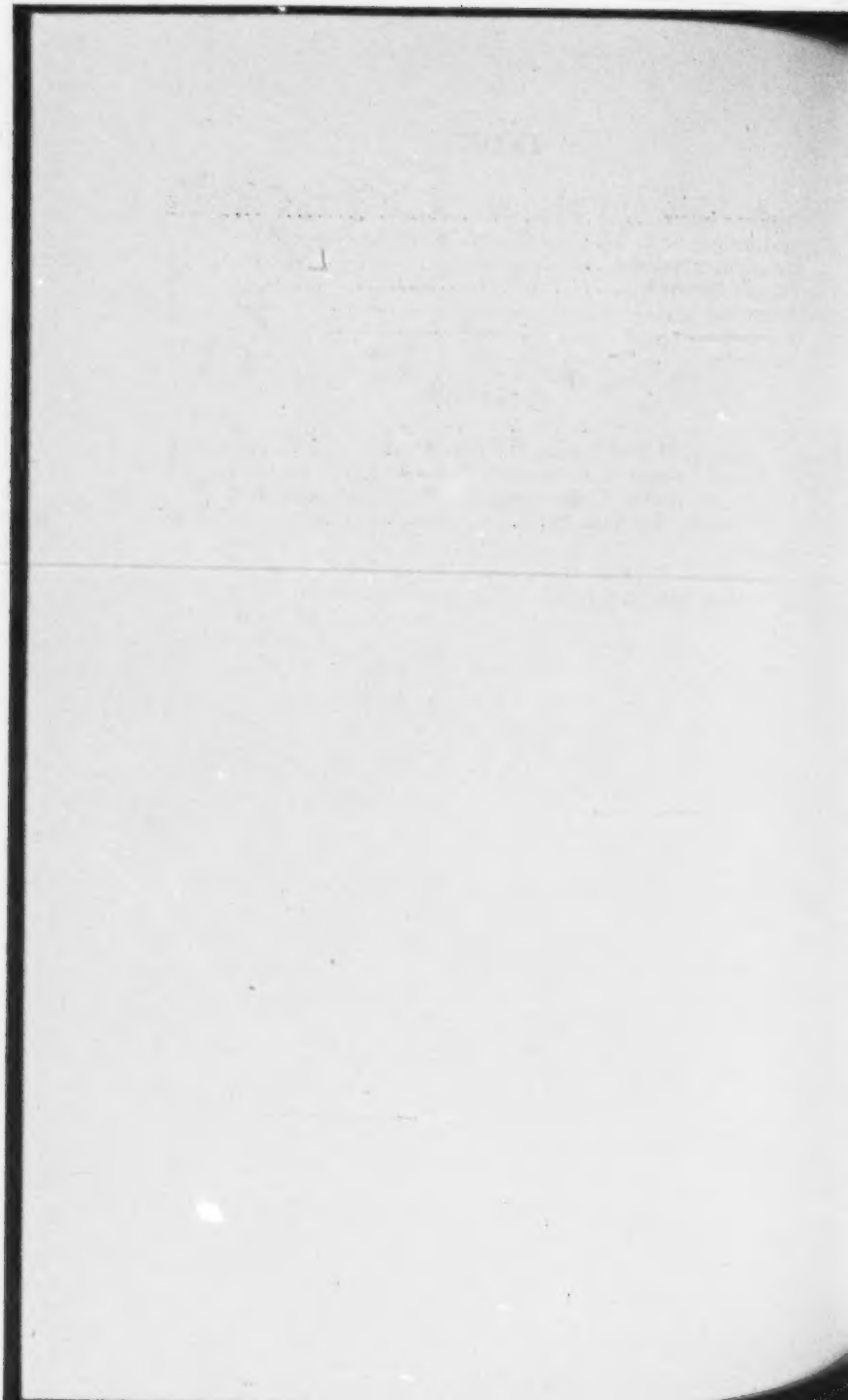
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In the Supreme Court of the United States

October Term, 1948

No. 704

ANTHONY LINQUATA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (R. 109-114) is reported at 173 F. 2d 201.

JURISDICTION

The judgment of the Court of Appeals was entered on March 9, 1949. (R. 114.) The petition for a writ of certiorari was filed on April 7, 1949. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254. See also Rules 37(b)(2) and 45(a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the jury's finding that the petitioner, who was the owner of a fishing vessel, actually received the owner's share of the proceeds from the sale of the vessel's catch.

2. Whether the trial court instructed the jury that they could infer receipt by the petitioner of the owner's share solely from the fact that he was the vessel's owner.

3. Whether the trial court properly charged the jury as to the connection, or lack of connection, between petitioner's wilfulness in evasion of his income taxes and the filing of false withholding tax returns relating to the income of members of the crew of his vessel.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or

imprisoned for not more than five years, or both, together with the costs of prosecution.

* * *

(26 U.S.C. 1946 ed., Sec. 145.)

STATEMENT

Petitioner was charged in a three-count indictment, returned in the District of Massachusetts, with having wilfully attempted to evade and defeat his income taxes for the calendar years 1942, 1943, and 1944 by filing false and fraudulent income tax returns for each year, in violation of Section 145 (b) of the Internal Revenue Code. The total net income charged to have been understated was $121,625.04, with a resultant tax deficiency of $73,459.94 for the years in question. (R. 1-4.) After a trial by jury, the petitioner was convicted on all three counts (R. 6), and was sentenced to imprisonment for a year and a day upon each count, the sentences to run concurrently, and was fined $1,000 on Count Three (R. 7-8).

The evidence showed that petitioner was a commercial fisherman and captain of the fishing boat Natalie III during the years 1942, 1943, and 1944. (R. 21, 27.) The proceeds from the sale of each catch, after deducting the cost of food, ice, and fuel, were divided proportionately among the members of the crew and the owner of the vessel under a so-called "lay system." (R. 9.) In 1942, when the vessel engaged principally in dragging for ground fish, division of the proceeds was made under the "60-40 lay" (R. 87), whereby the crew received sixty per cent of the proceeds and the

owner received forty per cent (R. 80). In 1943 and 1944, the boat engaged principally in seining for mackerel. (R. 109.) When seining, it generally carried a crew of fifteen men, including the captain, and the proceeds of the catch were divided under the "Italian lay." (R. 9, 84.) Under this method of division, the proceeds were divided into twenty-one equal shares: one share for each crew member and six shares for the owner. (R. 9.) In the returns which petitioner filed for each of the years in question, he reported his receipts as a crew member and a figure exactly six times this amount as the boat-owner's share of the proceeds. (R. 87.) Petitioner reported his income on the cash basis. (R. 46.)

When the catch was sold, it was the practice on the Natalie III for the crew member designated as purser to take the check received in payment, have it cashed, and return on board with the money. The money was then taken into the forecastle and, in the presence of the crew, the amount necessary to defray expenses was first laid aside, and then each man's share or percentage was calculated and counted out into a separate pile. Petitioner was seldom present when the division was made. The boat-owner's share on some occasions was delivered to the bookkeeper for a wholesale fish company who would deposit it in a local bank in the boat's name. At other times the owner's share was delivered directly to the petitioner's father. (R. 47-52.)

When questioned by the Internal Revenue agents, petitioner admitted that he was the sole owner of the Natalie III; that he had purchased the boat in 1940; that there had been a mortgage on the boat when he had purchased it, but not a mortgage through a bank; that he had received the money from his father, but had paid it all back; that he owned the boat free and clear (R. 43); that he had received six shares in addition to his share as a member of the crew (R. 44); that no one else had shared in the profits or distribution of income (R. 45); that the crew's share had been understated (R. 55); that he had been forced to do this in order to get a crew (R. 44).

At the trial, petitioner testified that, although he had reported the entire boat-owner's share as his income, he was not in fact the sole owner of the boat, but actually owned only a quarter interest and received only a quarter of the owner's share; that he had reported the entire boat-owner's share as his, because the person who had helped him prepare his returns had advised him to do so in view of the facts that his father, who owned half of the boat, was old, infirm, and illiterate, and his nephew, who owned the remaining quarter, was a minor (R. 88); that he had put down as the boat's share six times what he had received as a crew member (R. 87); that both the crew's share and the boat's share were understated (R. 90).

The Custom House registry reflected that petitioner had a quarter interest, his father a one-half

interest, and his nephew a quarter interest (R. 42), and the bookkeeper, a government witness, testified that she had been satisfied during the years in question, that petitioner had only a quarter interest (R. 36). The person who prepared the returns testified, on the other hand, that petitioner had told him he was the owner of the boat, and that the returns were made out on the basis of the information furnished by petitioner. (R. 9-10.) He denied that he had ever advised petitioner that he should report the entire boat-owner's share in his returns. (R. 11.)

Gross receipts were proved by the records of the firms which bought fish from the Natalie III. (R. 12-30.) Net income was arrived at by deducting from gross receipts the crew's wages and all known expenses. On the Government's theory, there was a substantial understatement for each year involved. Under petitioner's theory, his income was overstated in 1942 and 1943, and understated in the amount of $1,223.44 for 1944. (R. 69-76.)[1]

[1] The following table reflects the difference between reported net income and corrected net income as computed on the Government's theory of sole ownership and on petitioner's theory of one-quarter ownership:

Net Income

Year	Per Return	Government's Computation Based on Sole Ownership	Petitioner's Computation	
			Total of Petitioner's Share as Crew Member and Full Owner's Share	Total of Petitioner's Share as Crew Member and ¼ of Owner's Share
1942	$10,066.23	$23,284.84	$16,236.69	$ 7,546.69
1943	15,637.70	64,687.30	25,714.93	11,337.70
1944	7,227.61	47,453.91	18,796.37	8,451.05

On appeal, the judgment of conviction was affirmed by the Court of Appeals for the First Circuit. (R. 114.)

ARGUMENT

In this Court, as in the Court of Appeals (R. 111), the petitioner does not challenge the jury's basic finding that he was the sole owner of the vessel (Pet. 7), but rests his case on an alleged failure of proof that he actually received the owner's share of the proceeds, as well as on asserted errors in the trial court's instructions on that point and its rulings on admission of evidence. The record shows, however, that the conviction is fully sustained by the evidence and there were no errors in the charge or pertinent rulings.

1. Petitioner contends that the court instructed the jury that the sole fact of ownership of the boat would warrant a finding that petitioner received the boat's share of the proceeds. The part of the charge to which the petitioner objects is as follows (R. 99):

> Now, if you should decide that he was the sole owner of the boat, you would have sufficient evidence, it seems to me, to conclude that he was not only the owner but that he actually received the money. But you are not bound to do that. It is entirely up to you.

As the Court of Appeals points out (R. 113-114), a reading of the prior and subsequent comments of the trial court on this point makes it clear that the jury was not instructed that the sole fact of owner-

ship would warrant their finding that petitioner received all of the income from the boat.[2] Sole ownership was only one of many circumstances, and it is obvious that the court meant that a finding of sole ownership, when added to the other evi-

[2] In addition to the parts of the charge quoted by the Court of Appeals, see:

"There is no affirmative clear showing that Anthony Linquata himself was present at a division of the money. So you have no direct evidence that Anthony Linquata received cash except perhaps the cash he received as a captain and a member of the crew, but you may make such inference from the surrounding circumstances as a reasonable man would make. You cannot find that Anthony Linquata got the money unless you are persuaded beyond a reasonable doubt that he got it either directly or through somebody acting for him, and you cannot say that he got the money unless he got it for his own account." (R. 96.)

"Now, you will bear in mind that the first line of defense of the defendant is that he never received the money which the Government says he received in this case. The defendant has repeatedly pointed out that he was on a cash receipts basis, and the Government, according to the defendant, has not shown that the defendant got the money. It is a question of fact which is up to you to decide, and I do not mean, directly or indirectly, to intimate any view. It is entirely a question for you.

"The defendant says that even if he did receive the money, he did not receive it for his own account, or at least not entirely for his own account. The defendant says that during the years 1942, 1943 and 1944 the true ownership of the boat and the true right to receive the earnings of an owner were so divided that he, Anthony Linquata, had a right to only one-quarter; that his father, Marco, had a right to one-half, and that his nephew, Tommy, or Thomas, (whose trustee was Luigi) had a right to the other fourth. That is a plain question of fact for you to decide and not for me." (R. 97-98.)

"On all those issues you will remember that the Government has the burden of proving its case beyond a reasonable

dence, would, in the court's opinion, justify the finding that petitioner actually received the owner's share of the proceeds.

The other evidence—added to the proof of ownership—was certainly sufficient to permit the jury to find that the defendant had actually received the owner's share. Petitioner admitted to the Internal Revenue agents that he got six shares in addition to his own share as a member of the crew; and that no one else participated in the profits or distribution of income. (R. 44-45) Further proof is found in the fact that he reported the owner's share in his returns (R. 87), and the whole is buttressed by petitioner's relationship to the other persons alleged to have received the proceeds, and by the general circumstances surrounding the division of the money. And, contrary to the petition's assertion (Pet. 17-19), there is no necessary inconsistency between the testimony of some of the Government's witnesses that the owner's share was sometimes brought to petitioner's aged father's house, and the jury's finding that that share was ultimately received by petitioner.[3]

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doubt. You must be persuaded on each count that the defendant actually received a total net income in excess of what he returned. You must be persuaded that he wilfully attempted to evade or defeat his tax by the conduct that he followed." (R. 101.)

[3] Moreover, in a criminal case the Government is not bound by the adverse testimony of witnesses whom it calls, since it may be said to be the duty of the prosecution to call all witnesses within reach of process. *United States* v. *Palese*, 133 F.2d 600 (C.A. 3). It is the jury's province to accept so

2. Petitioner also incorrectly challenges the admission into evidence of tax withholding returns signed by him relating to the earnings of the crew (Pet. 14-17). These returns reflected that petitioner was the owner of the Natalie III, and were signed and sworn to by him. (R. 37.) When ruling on their admissibility, the court specifically stated, "I admit them and leave to the jury to determine what they show as to ownership" (R. 37)—and the issue of ownership is no longer in the case (Pet. 7, R. 111).

Nor did the trial court improperly permit the jury to infer wilfulness in petitioner's evasion of his own income taxes from the fact that the withholding returns were false. On this point, the court's charge was entirely in accord with the doctrine of *Spies* v. *United States,* 317 U.S. 492, 499-500.[4]

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much of the witnesses' testimony as seems probable and to reject the improbable. *United States* v. *Reginelli,* 133 F.2d 595 (C.A. 3), certiorari denied, 318 U.S. 783.

[4] "In considering this case you have no right to take into account whether somebody else did or did not pay his lawful tax. It is none of our business here whether the father of Anthony Linquata paid a lawful tax or whether the members of the crew paid a lawful tax. We are dealing only with Anthony Linquata." (R. 97.)

"In connection with the word 'wilfully' I now want to state a little more than I have previously stated. I have told you that 'wilfully' means malevolently, with a bad heart. Now, how do you conclude whether the defendant had been acting wilfully or malevolently? You have no right to take into account that he underpaid another tax. You cannot take into account that he underpaid, if he did underpay, a social security tax. You cannot take into account any other under-

CONCLUSION

The decision below is in all respects correct. No important question of law or conflict of decisions is presented. It is therefore respectfully submitted that the petition should be denied.

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MAY 1949.

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payments. But you have a right to take into account whether he kept records in accordance with law *in order to compute this income tax.*" (R. 100. Italics supplied)

"The law requires that every man who is subject to the income tax law should keep accurate records. If a person fails to keep records or keeps inaccurate records deliberately, or keeps related records in a deliberately false manner, then you have a basis for saying that he was wilfully seeking to evade or defeat the tax. You have a right to take into account his course of conduct contemporaneously with the earning of the money to see whether or not he is trying to keep the records correctly and in accordance with law in order that he could make a correct report and payment, and if he has deliberately kept false records or knows that false records are being made which will be used in connection with the computation of his income tax, you may, if you see fit, conclude that he wilfully attempted to evade or defeat a tax." (R. 100-1)

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